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# Fair Trial - Equal in Value to Free Press

Robert G. Weclew

# FAIR TRIAL–EQUAL IN VALUE TO FREE PRESS

ROBERT G. WECLEW*

WHEN Mr. Justice Holmes enunciated the clear and present danger doctrine in *Schenk v. United States*[1] and when Mr. Justice Sanford subsequently assumed that freedom of speech and of press were fundamental rights protected by the due process clause of the fourteenth amendment in *Gitlow v. New York*,[2] the foundations were laid for the "free press" portion of the "free press-fair trial" problem. When newspapers, in a mob-dominated atmosphere, daily published inflammatory material, and the defendants' attorneys didn't feel free to request a continuance, a change of venue, or separate trials, the Supreme Court, in *Moore v. Dempsey*,[3] held the accused were denied due process. Thus, an initial contribution was made to "fair trial."

In the hierarchy of values first amendment rights forged rapidly ahead, sometimes within, but usually without, the milieu of a trial conducted in accordance with due process. The newspapers, magazines, radio and other organs for mass information having more friends and influence than those accused of crime found a favorable climate for their opinions and values. In the context of an amendment which encouraged full and free expression in a democratic society, these opinions and values gave rise to doctrines that placed the entire contents of the amendment in a special position usually impervious to assault. The clear and present danger test was reenforced by the "preferred position" doctrine along with presumptions of invalidity.[4] The clear and present danger test, the preferred position test, and presumption of unconstitutionality applied only to first amendment rights.

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* MR. WECLEW *is a Professor of Law at De Paul University College of Law. He received his J.D. at Northwestern University and is a member of the Illinois Bar.*

1 249 U.S. 47, 52 (1919): "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

2 268 U.S. 652, 666 (1925).

3 261 U.S. 86 (1923).

4 Herndon v. Lowry, 301 U.S. 242, 258 (1937); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

It wasn't until 1932 that the modern law of due process in state criminal cases began. It was at this time that the defendant was granted right to counsel and, then, only in the context of specific circumstances.[5] Specific circumstances determined if fundamental fairness had been violated, thereby denying a fair trial. It was only by a process of gradual incorporation that certain of the Bill of Rights became part of the due process clause of the fourteenth amendment as a flat requirement and as a matter of fundamental right.[6] First amendment rights reached a peak in the 1940's. However, the Court even now continues to reinterpret constitutional principles to give the accused in criminal cases more favorable treatment.[7]

The due process clause of the fifth amendment in addition to the sixth amendment provisions for a speedy and public jury trial, and the rights of the defendant to know the nature of the accusation, and to confront any adverse witnesses, as well as the rights to compulsory process for obtaining favorable witnesses, and assistance of counsel furnish the constitutional tools for "fair trial." The due process clause of the fourteenth amendment guarantees a fair trial in cases coming up from state tribunals.

The first amendment's guarantees of free speech, free press and the right to petition constitute the elements for "free press." These rights embodied in the first amendment and the values they represent come into competition with rights of the fifth and sixth amendment as well as, in state cases, the fourteenth amendment where criticism, comment, or information is published before, during, or after a trial. The Supreme Court may ultimately be called upon to rule how best to resolve the competing interests of news media and the press, on the one hand, and society which has a strong interest in the fair administration of justice, on the other hand.

## THE PROBLEM

The accused is entitled to a trial in accordance with the rules of evidence, practice and procedure and constitutional law that have been developed to insure the unfolding of the truth without denying the rights of the litigants in the adversary system. The news media

[5] Powell v. Alabama, 287 U.S. 45 (1932).

[6] E.g., Gideon v. Wainwright, 372 U.S. 335 (1963).

[7] E.g., Miranda v. State of Arizona, 86 S.Ct. 1602 (1966 : Statements during interrogation come within fifth amendment protection.

in their reporting of a trial are not subject to such legal limitations as the hearsay rule, the right to confront and cross-examine witnesses, and the best evidence rule. The trial court, however, must decide what evidence to admit on the basis of these rules and must, presumably, reach a decision solely on this evidence. Therefore, the public obtains one view of what happened through the news media while the jury at the trial gets another, probably different, view from the admissible evidence.[8] The juror may unknowingly view press accounts of a witness' testimony as independent evidence. When the same witness testifies in court, the juror's belief in guilt initially created by the newspaper account may survive or color the evidence even though this evidence has been properly presented at trial.[9]

When the news media conveyed uncontradicted and unsworn evidence not subject to cross-examination to prospective jurors, the "defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated."[10] The ideal embodied in the concept of a fair trial is that the "conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence whether of private talk or public print."[11] When the press leads the community to believe the defendant is guilty by publishing inadmissible evidence such as a coerced confession, the results of a lie detector test or his record of prior convictions, what is the remedy available to the accused? What recourse does the state have?

## CUSTOMARY REMEDIES

The remedies available may involve solely the right to a fair trial in the face of adverse publicity. Where the right to a fair trial does not involve direct action against the news media, the court may rule, for example, that a change of venue should have been granted because of the prejudicial publicity. However, a remedy that penalizes the one who disseminates information that denies a fair trial will lead

[8] Goldfarb, *Public Information, Criminal Trials and the Cause Celebre,* 36 N.Y.U.L. REV. 810, 811 (1961).

[9] Comment, *Fair Trial v. Free Press: The Psychological Effect of Pre-Trial Publicity on the Juror's Ability to Be Impartial: A Plea for Reform,* 38 So. CAL. L. REV. 672, 685 (1966).

[10] Shepherd v. Florida, 341 U.S. 50, 51 (1951) (separate opinion, Jackson, J.).

[11] Attorney General *ex rel.* Patterson v. Colorado, 205 U.S. 454, 462 (1907).

to a clash between first amendment, on one hand, and fifth, sixth, and fourteenth amendment rights, on the other hand. Courts have been understandably reluctant in exercising their contempt powers where the courts must choose between competing constitutional values since in the past first amendment values have been favored.[12] The Supreme Court nevertheless recognized that "There is also the conceded authority of the courts to punish for contempt when publications directly tend to prevent the discharge of the judicial function."[13] Both state and federal courts have favored the fair trial approach and have reversed and remanded rather than suggesting that the culprit responsible for the denial of an impartial trial be directly attacked. The courts' aversion to exercising their contempt power probably stems from their awareness that the culprit is armed with a competing constitutional right. Arguments such as "the reasonable alternatives available" or "the end can be more narrowly achieved without impinging on constitutional rights" have been the vehicles for refusing to exercise the contempt powers.[14]

*Sheppard v. Maxwell*[15] represents the court's usual approach to adverse publicity by the news media. The trial judge failed to control disruptive influences of news media in the courtroom; he failed to protect the defendant from extensive inherently prejudicial press publicity and publicized evidence which was never introduced or attempted to be introduced at the trial; he failed to properly question jurors as to information obtained from outside sources; he exercised poor supervision during jury sequestration; and he failed to insulate witnesses and control release of information. The Court ordered a new trial suggesting that because of prejudicial pre-trial publicity a continuance or change of venue would have been in order and, because of unfair publicity during trial, a mistrial should have been declared and a new trial ordered below. The main thrust of the opinion was that the trial judge should have exercised controls within his power.

These remedies, plus others suggested, may be helpful in eventually leading to a fair trial for the accused, but they have their drawbacks. A continuance, for instance, may conflict with the defendant's right

[12] Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946); Craig v. Harney, 331 U.S. 367 (1947).

[13] Near v. Minnesota, 283 U.S. 697, 715 (1931).

[14] Shelton v. Tucker, 364 U.S. 479 (1960).

[15] 86 S.Ct. 1507 (1966).

to a speedy trial guaranteed under the sixth amendment in federal cases; witnesses will disappear; memories may fade; and the specter of unfair publicity may rise again in renewed form to infect the postponed trial.

A change of venue, on the other hand, could deny the constitutional right to a trial in the state or district where the crime was committed. There could also be added expense in procuring and transporting witnesses. Yet, in this day of extensive television, radio, and newspaper coverage the adverse publicity might well follow into the next county.

There is no assurance that in granting mistrials and new trials unfavorable publicity will not revive itself. Much of the trial judge's attitude toward the guilt of the accused and much of his affinity to publicity could be carried over with greater sublety into the new trial.

*Voir dire* with its accompanying challenges for cause may provide an opportunity to remove a juror so exposed to publicity that he is unable to render a fair verdict. This, however, has its limitations. If the juror is aware of the influences and has no reservations in admitting to them they will be uncovered. On the other hand, half forgotten material within the juror's knowledge may seem too unimportant to discuss; yet, it may be sufficient to change his vote when the jury retires.[16] As Mr. Justice Frankfurter's concurring opinion in *Maryland v. Baltimore Radio Show* said:

> [I]t hardly seems necessary for the Court to say to men who are experienced in the trial of jury cases, that every time Defense Counsel asked a prospective juror whether he had heard a radio broadcast to the effect that his client confessed to this crime or that he has been guilty of similar crimes, he would by that act be driving one more nail into James' coffin. We think, therefore, that remedy was useless.[17]

If the juror indicates he is able to make his decision solely on the evidence introduced in court, he is an impartial juror under the sixth amendment. Where the judge denies a challenge for cause under these circumstances, even though this juror admits that such pre-trial publicity had caused him to form an opinion as to guilt, the denial will stand. It is quite difficult for the defendant to set forth a presumption of the juror's partiality in such case.[18]

Admonitions and cautionary instructions to the jury to decide on

[16] Wright, *A Judge's View: The News Media and Criminal Justice*, 50 A.B.A.J. 1125, 1126 (1964).

[17] 338 U.S. 912, 916 (1950).

[18] Reynolds v. United States, 98 U.S. 145 (1878).

the evidence admissible in court and to ignore outside influences often fail to accomplish any useful purpose. "The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction."[19]

Sequestration of the jury can protect from the effects of publicity during trial but not from pre-trial publicity. It is also distasteful to the jurors, particularly during trials that are protracted, and should generally be avoided except during deliberations.

Since the above solutions have little deterrent effect on the news media and may have harmful effects on the defendant's case, as well as the prosecution's, we must look elsewhere for effective solutions.

More effective solutions would involve sanctions against those who possess information that can be passed on to the news media. Included would be court employees, law enforcement officers, witnesses, counsel for the defense and prosecution and government employees. Sanctions against those who gather and distribute the information that might prejudice the trial would also be in order, but this would require a reconsideration and reevaluation of important Supreme Court doctrine heretofore promulgated in this area.

## CONTEMPT BY PUBLICATION

Constructive contempt has not been the answer to date. In the federal court system the interpretation of a statute[20] limiting the power of the federal courts to punish by contempt for misbehavior in the presence of the court, "or so near thereto as to obstruct the administration of justice," was for some time favorable to the contempt power. In 1918 the Court upheld the district court judge's ruling, finding a newspaper in contempt for publishing cartoons and editorials in a contested rate case. The court relied on the test which looks to "the reasonable tendency of the acts done to influence or bring about the baleful result . . . without reference to the consideration of how far they may have been without influence in a particular case."[21] The connection between the act done and obstruction to the administration of justice was deemed "causal" and not "geographic."

[19] Krulewitch v. United States, 336 U.S. 440, 553 (1949); to the same effect, see Holtzoff, *The Relation between the Right to a Fair Trial and the Right of Freedom of the Press*, 1 SYRACUSE L. REV. 369 (1950).

[20] Act of March 2, 1831, ch. 99 §§ 1, 4 Stat. 487 [substantially reenacted in 18 U.S.C. § 401 (1956)].

[21] Toledo Newspaper Co. v. United States, 247 U.S. 402, 421 (1918).

However, in 1941, a majority of the Court, in a six to three decision, said "so near thereto" means geographic nearness,[22] and plying the plaintiff with liquor and furnishing him other inducement to dismiss a civil case one hundred miles from the trial court was not a violation of the statute. Thus, causal connection is no longer the primary standard.

Significantly the Court rendered its first decision on the matter of state court contempt power over publication the same year in *Bridges v. California.*[23] This was a five to four decision. Harry Bridges, a labor leader, published a telegram he had sent to the Secretary of Labor criticizing the decision of a state court judge and stating the decision would lead to a strike. A contempt conviction resulted. The editor of a newspaper was also found in contempt for publishing editorials urging denial of probation to two labor leaders convicted of assault. Juries were not involved. In *Bridges* a right to petition under the first amendment was asserted and recognized. The Court held that the ill effects of comment must be "extremely serious and the degree of imminence high before utterances can be punished."[24] The Court did not deny that there could be contempt by publication if particular facts and circumstances showed it,[25] but an examination of the facts and circumstances convinced the majority that its standard had not been met.

Mr. Justice Frankfurter speaking for the dissent expressed the philosophy of those who consider fair trial in the same hierarchy of values as free speech:

> But the Bill of Rights is not self-destructive. Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials, and since courts are the ultimate resorts for vindicating the Bill of Rights, a state may surely authorize appropriate historic means to assure that the process of such vindication be not wrenched from its rational tracks into the more primitive mêleē of passion and pressure. The need is great that courts be criticized but just as great that they be allowed to do their duty.[26]

Frankfurter had confidence in the judicial use of the contempt power. Their consciences, their high professional standards, their concern for respect by lawyers and fellow judges, their concern for another term, their knowledge of the ability of the appellate court to nullify their action, as well as their knowing that the news media

[22] Nye v. United States, 313 U.S. 33, 47–53 (1941).

[23] 314 U.S. 252 (1941).

[24] *Id.* at 263.

[25] *Id.* at 271.

[26] *Id.* at 284.

could comment fully after completion of all judicial action would cause judges to make judicious use of the contempt power.[27]

The Court was unanimous in its next contempt by publication case when it decided in *Pennekamp v. Florida*[28] that newspaper criticism of action already taken in dismissing certain indictments was not a clear and present danger to justice, the matter being pending in certain respects. The Court emphasized that the comment concerned the attitude of the judges regarding those under indictment and was not comment regarding evidence and rulings during a jury trial. The impact on jurors who might eventually try the cases was too remote.[29] Justice Frankfurter's concurrence was on the basis that the court had already rendered its decision and the offending statements were criticism of the decision and not attempts to influence it.[30] Had Justice Frankfurter deemed the matter pending, he would have held that "the rights to undermine proceedings in court is not a prerogative of the press."[31]

A divided court in *Craig v. Harney*[32] found that newspaper comment that attacked an elected layman judge while a motion for new trial was pending in a civil case did not present "an imminent, not merely a likely, threat to the administration of justice."[33] Thus, for all practical purposes the clear and present danger test brings the same results in state courts as the federal contempt statute brings in the federal courts.

In *Wood v. Georgia*,[34] a five to two decision, an elected judge charged the grand jury with investigating block voting by Negroes and political corruption in the purchase of their votes. The elected sheriff issued a press statement criticizing the judge's charge. He was found guilty of contempt, the lower court stating, without reasons or findings, that the sheriff's statements constituted a "clear, present, and imminent danger" to the administration of justice. The Supreme Court, while not denying the principles of *Bridges*, *Pennekamp*, and *Harney*, was able to distinguish them. The Court's conclusion was not that the statements did not constitute a "clear and present danger" but that they "did not present a [any] danger [whatsoever] to the

[27] *Id.* at 304.

[28] 328 U.S. 331 (1946).

[29] *Id.* at 348.

[30] *Id.* at 369.

[31] *Id.* at 364.

[32] 331 U.S. 367 (1947).

[33] *Id.* at 376.

[34] 370 U.S. 375 (1962).

administration of justice . . . ."[35] The Court's decision rested in large part on the lack of reasons and findings; "[the lower court] simply adopted as conclusions of law the allegations made in the contempt citation."[36] In a dictum the Court went out of its way to distinguish this case from cases where the court's contempt power might seemingly be felt:

> [T]his case does not present a situation where an individual is on trial: there was no "judicial proceeding pending" in the sense that prejudice might result to one litigant or the other. . . . Moreover, we need not pause here to consider the variant factors that would be present in a case involving a petit jury. Neither *Bridges, Pennekamp* nor *Harney* involved a trial by jury. In *Bridges* it was noted that "trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper" . . . and of course the limitations on free speech assume a different proportion when expression is directed to a trial as compared to a grand jury investigation. Rather, the grand jury was conducting a general investigation into a matter touching each member of the community.[37]

After reading *Bridges, Pennekamp,* and *Harney* one could assume that a trial could be pending virtually from the filing of a complaint in a civil suit or arrest of the accused in a criminal matter all the way through appeal as long as there is any decision along the way that may be influenced by publication.[38] In *Wood* the Court might be opening the door to redefining and limiting what is "pending" and what is a "trial" so as to deny the clear and present danger test, at least in jury trials. On the other hand, the implication could be that where a trial is pending prejudicial publicity could present a clear and present danger to a defendant's right to a fair trial. Again, in *Wood* political issues were being threshed out by elected officials opposing each other in a coming election. All of the electorate had an interest in the matters being discussed. Open criticism and discussion at the heart of the political processes should stand high in the hierarchy of values. The speech here concerning the governing process can be distinguished from the speech in *Bridges, Pennekamp,* and *Harney* which was divorced from free expression in political matters. "The right to speak is the individualized legal reflection of the more generalized right to hear, which is basic to the process of political flux."[39]

[35] *Id.* at 395.

[36] *Id.* at 387.

[37] *Id.* at 389–90.

[38] Note, 59 YALE L.J. 534 (1950).

[39] FREUND, THE SUPREME COURT OF THE UNITED STATES 81 (1961).

FAIR TRIAL

The fair trial approach, aside from any penalty to the disseminator of prejudicial publicity, has moved in the direction of greater liberality to the accused. The evolution of the cases involving this fair trial approach stressed the issue of whether the newspaper accounts aroused such prejudice that the trial lacked fundamental fairness rather than the issue concerning the permissible scope of news media comment. In *Stroble v. California*,[40] petitioner claimed he was denied a fair trial because of inflammatory newspaper accounts laid at the door of the district attorney. The Court found there had been no motion for a change of venue. The jurors on *voir dire* said they would presume his innocence. Last, but not least, the petitioner failed by affidavit, or otherwise, to show that newspaper accounts aroused such prejudicial publicity as to deny him a fair trial.[41] Here the burden was on the accused to show prejudicial publicity; a burden he would find very difficult to meet.

In *Marshall v. United States*[42] the Supreme Court used its supervisory power with reference to devising proper standards for criminal law enforcement in the federal courts to grant a new trial. The jurors on *voir dire* had insisted they would not be influenced by news stories of defendant's past convictions. In granting a new trial the Court recognized the lack of protective procedures when prejudicial accounts reached jurors through outside sources.[43]

In *Irvin v. Dowd*[44] the accused's parole violation and previous criminal record were published. The news media said he had been identified at the police line-up and that he had refused at first to confess and later confessed. The Court granted that the burden of showing the juror's partiality was on the challenger. Preconceived opinions do not disqualify, it being sufficient if the juror is able to ignore his opinion and render a verdict on evidence produced in open court. The Court then said it was the duty of the Court of Appeals to evaluate the *voire dire* testimony of the jurors. It then found that the defendant had not been accorded a fair trial by an impartial jury.[45] Here, for the first time, the Court reversed a state court decision solely because of

[40] 343 U.S. 181 (1952).

[41] *Id.* at 193.

[42] 360 U.S. 310 (1959).

[43] *Id.* at 312–313.

[44] 366 U.S. 717 (1961).

[45] *Id.* at 722–23.

the harmful influence of pretrial publicity, a "pattern of deep and bitter hostility" being shown on *voir dire* examination.[46]

The Court, however, reached an opposite conclusion in *Beck v. Washington*.[47] Beck claimed intensive and voluminous unfavorable publicity had violated his due process rights to a fair trial. Yet, there had been no challenge of any of the jurors for cause. The Court found the accused had failed to sustain the burden of showing essential unfairness "as a demonstrable reality."[48]

Television, with its "intimacy and immediacy," in becoming the primary source of news to the American public[49] presented new facets of influence that the Court met head-on in *Rideau v. Louisiana*.[50] There, after a bank was robbed, three employees kidnapped, and one person killed, a twenty minute filmed interview between the accused and the sheriff was televised three times in the area. The interview was basically a confession by the accused to the robbery, kidnapping, and murder. At arraignment a request for a change of venue was denied. The Court did not concern itself with examination of the *voir dire* transcript nor with the question whether the confession was admissible or even offered in evidence. It did not place the burden on the accused to show prejudice. The filmed televised interview by itself was sufficient to call for reversal without showing how the jurors were affected or whether any jurors were affected. The Court said:

> Under our Constitution's guarantee of due process, a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a judge. Yet in this case the people of Calcasieu Parish saw and heard not once but three times, a "trial" of Rideau in fact presided over by a sheriff, where there was no lawyer to advise Rideau of his right to remain mute.[51]

Here for the first time the Court recognized that pre-trial publicity in and of itself could so infect the trial as to leave it no more than a formality calling for a verdict of guilt. Showing of a nexus between the televised confession and trial was not necessary. "Ordeal by publicity, the legitimate great-grandchild of ordeal by fire, water, and

[46] *Id.* at 727. [47] 369 U.S. 541 (1962). [48] *Id.* at 558.

[49] Daly, *Ensuring Fair Trials and a Free Press for the Press and Bar Alike*, 50 A.B.A.J. 1037, 1039 (1964).

[50] 373 U.S. 723 (1963).

[51] *Id.* at 726–27.

battle serves no legitimate function here in the search for truth."[52]

*Estes v. Texas*[53] involved the question of whether televising part of the proceedings in a state criminal case over the defendant's objection violated his due process right to a fair trial. No question was involved here of violation of the Canons of Ethics, first amendment rights, prejudicial publicity or admission of evidence. The main thrust of the Court's opinion was that television would not contribute to the search for truth but would distract the parties, the lawyers, the witnesses, and the judge, thereby prejudicing the defendant's case, lessening the reliability of his trial and denying him a fair trial as required by due process. "[O]nly where the public interest really dictates should any party to the judicial process become a party to the publicity process as well."[54]

## CHANGING VALUES

It is submitted that the scales have shifted from superiority of first amendment rights to an equilibrium between first amendment rights on one hand and sixth amendment rights and due process on the other hand so that action penalizing prejudicial publicity whether it originates with lawyers, prosecutors, enforcement officers, or the press is in order.

The concept of the guarantee of a public trial as a reenforcement to free press rights was negatived by Mr. Chief Justice Warren when he said in his concurring opinion in *Estes*, "But the guarantee of a public trial confers no special benefits on the press, the radio industry or the television industry."[55] Mr. Justice Harlan in the same case said "[A] reporter's constitutional rights are no greater than those of any other member of the public."[56] The purpose of public trials is not to entertain or instruct but to eliminate secret trials.[57] When the trial judge ordered the general public and the press from the courtroom in the interests of "good morals" and "sound administration of justice" the United Press in *United Press Ass'n v. Valente*[58] brought an action

[52] Boldt, *Should Canon 35 Be Amended? A Federal Judge Answers No*, 41 A.B.A.J. 55 (1955).

[53] 381 U.S. 532 (1965).

[54] Wessel, *Controlling Prejudicial Publicity in Criminal Cases*, 48 J.AM.JUD. SOCY. 105, 107 (1964).

[55] 381 U.S. at 583. [56] *Id.* at 589.

[57] Douglas, *The Public Trial and the Free Press*, 46 A.B.A.J. 840, 842 (1960).

[58] 308 N.Y. 71, 123 N.E.2d 777 (1954).

to restrain the judge from giving effect to his decision. On appeal it was held that the freedom of the press was not abridged and that the judge's ruling "did not deprive petitioners of any right or privilege of which they may complain."[59] The right to a public trial has the primary purpose of giving the accused the greater degree of fairness that is inherent in public proceedings as opposed to star chamber proceedings.

Since *Bridges*, *Penekamp*, and *Harney*[60] fair trial has been reenforced by holdings that sixth amendment rights to confront and cross-examine witnesses in criminal cases[61] and the right to counsel[62] are made obligatory on the states by reason of the fourteenth amendment.

While, initially, coerced confessions were inadmissible because they were deemed untrustworthy, confessions now are rejected because the Court disapproves of police methods used and therefore penalizes the law enforcement officers by denying their hard work any consideration.[63] Likewise, sanctions are now applied where evidence is illegally seized by refusing to admit the illegally seized material into evidence or reversing a conviction if such evidence has been admitted.[64] This supplements other remedies such as trespass, civil rights suits, breaking and entering and assault actions brought against the offending police.

The Court has been paying more than lip service to Justice Frankfurter's dictum that "not the least significant test of the quality of a civilization is its treatment of those charged with crimes particularly with offenses which arouse the passions of a community."[65] For example, recognition of indigents' rights[66] and liberalization of federal habeas corpus[67] have affirmed a philosophy of expanded protection to the accused in criminal cases.

[59] *Id.* at 77, 123 N.E.2d at 777.

[60] Cases cited note 12 *supra*.

[61] *Pointer v. Texas*, 380 U.S. 400 (1965).

[62] Gideon v. Wainwright, 372 U.S. 335 (1963).

[63] *Supra* note 7.

[64] Mapp v. Ohio, 367 U.S. 643 (1961).

[65] *Supra* note 44, at 729 (concurring opinion).

[66] Griffin v. Illinois, 351 U.S. 12 (1956).

[67] Fay v. Noia, 372 U.S. 391 (1963).

THE DECLINE OF THE CLEAR AND PRESENT DANGER DOCTRINE

The Court has carved out specific exceptions to first amendment protection since *Bridges*, *Penekamp*, and *Harney*. Incitement to action for the forcible overthrow of government,[68] utterances of a libelous nature,[69] incitement to riot,[70] and obscene speech and press[71] have no redeeming social value and are denied first amendment protection.

The decline of the clear and present danger test with its embellishing preferred position argument weakens the underpinnings of the cases which denied contempt by publication. The clear and present danger test had significant strength solely from 1937 to 1951. Then it was always a divided court that applied the doctrine.[72] There were many situations where the Court could have utilized the doctrine during that period, but it did so only nine times.[73] Three of the cases involved contempt by publication.[74] Two were flag salute cases with religious freedom of major concern.[75] Two involved picketing.[76] One concerned soliciting membership in a union.[77] One decided the matter of the conviction of a communist organizer under a state syndicalism act.[78]

The clear and present danger doctrine has been abandoned in picketing cases and now "state courts and legislatures are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing."[79] In *Cox v. Louisiana*[80] demonstrations before the courthouse to protest the arrest

[68] Yates v. United States, 354 U.S. 298 (1957).

[69] Beauharnais v. Illinois, 343 U.S. 250 (1952).

[70] Fiener v. New York, 340 U.S. 315 (1951).

[71] Roth v. United States, 354 U.S. 476 (1957).

[72] Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313, 320 (1952): "The clear and present danger test has never had more than four consistent supporters sitting as members of the Court at any one time."

[73] McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182, 1207 (1959).

[74] Cases cited note 12 *supra*.

[75] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Taylor v. Mississippi, 319 U.S. 583 (1943).

[76] Carlson v. California, 310 U.S. 106 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940).

[77] Thomas v. Collins, 323 U.S. 516 (1945).

[78] Herndon v. Lowry, 301 U.S. 242 (1937).

[79] International Brotherhood of Teamsters, Local 695, A.F.L., v. Vogt, Inc., 354 U.S. 284, 297 (1957) (dissenting opinion, Douglas, J.).

[80] 379 U.S. 559 (1965).

of students incarcerated in the building were not protected in the face of a narrowly drawn statute designed to prohibit such conduct. The Court said that "judges are human; and the legislature has the right to recognize the danger that some judges, jurors, and other court officials will be consciously or unconsciously influenced by demonstrations in or near their courtrooms prior to or at the time of trial."[81] Further the Court rejected appellant's clear and present danger argument and said "we deal . . . not with speech in its pristine form but conduct of a different character."[82]

The clear and present danger doctrine underwent modification in *Dennis v. United States*.[83] The test that emerged was "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[84] With "immincence" eliminated, the test takes on a "reasonable" approach. The test may now be one of "clearness and probability" with balancing brought in and preference for the first amendment taken out. The doctrine was not for many years the basis for an important opinion either in its original or in its modified form.[85]

Mr. Justice Jackson's concurrence in *Dennis* suggests the abandonment of the clear and present danger test in the more serious cases. His suggestion is:

> [S]ave it . . . for application as a "rule of reason" in the kind of case for which it was devised. When the issue is criminality of a hot headed speech on a street corner, or circulation of a few incendiary pamphlets, or parading by some zealots behind a red flag, it is not beyond the judicial process to gather, comprehend, and weigh the necessary materials for decision whether it is a clear and present danger of substantial evil or a harmless letting off of steam.[86]

Over the past several years the Court, while not specifically rejecting the clear and present danger doctrine, has either ignored it, found reasons for not applying it or paid it no more than lip service in cases of consequence. In determining whether first amendment rights have been violated, the Court has been prone to balance those rights against important state interests. It balanced self preservation against personal liberties;[87] it balanced the state's interest in keeping those advocating

[81] *Id.* at 565.

[82] *Id.* at 566.

[83] 341 U.S. 494 (1951).

[84] *Id.* at 510.

[85] McKay, *supra* note 73, at 1209.

[86] *Supra* note 83, at 568.

[87] Communist Party of America v. Subversive Activities Control Board, 367 U.S. 1 (1961).

violent overthrow from becoming attorneys against the deterrent effect that compelled disclosure would have on free speech and association;[88] it balanced public interests in the results of congressional investigations against private interests in remaining silent and found the subordinating interest of the government compelling;[89] it weighed public interest in membership lists against private associational rights and found no such compelling interest that would outweigh private rights.[90]

Now the Court could balance constitutional values and rights and find in the individual case that the accused's right to a fair trial and the public interest in the proper administration of justice outweigh the newspaper's right to publish prejudicial information. It could find that publication of such information presents a clear and present danger to the defendant's right to a fair trial. *Wood v. Georgia*[91] in finding no danger (rather than no clear and present danger) to the administration of justice[92] and in emphasizing that an individual was not on trial, that a judicial proceeding where prejudice could result to an individual was not pending, and that a petit jury was not involved[93] left open the question of sanctions for those who publish prejudicial material while the adversary system is working and a trial is in progress.

The Court's liberal faction very well might be torn between supporting "free press" or "fair trial." This might leave determination of the ultimate value to the conservative faction. In *Baltimore Radio Show v. Maryland*,[94] the Maryland Civil Liberties Committee favored a fair trial while the American Civil Liberties Union favored the rights of a free press.

One detects not only an appreciation of the high value of a fair trial but also an intimation that this is a preferred freedom when the Court says, as it did in *Estes:* "We have always held that the atmosphere essential to a fair trial—the most fundamental of all freedoms—must be maintained at all costs."[95]

In *Sheppard v. Maxwell*[96] Mr. Justice Clark encouraged those who

[88] Konigsberg v. State of California, 366 U.S. 36 (1961).

[89] Barenblatt v. United States, 360 U.S. 109 (1959).

[90] Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963).

[91] *Supra* note 34, at 375. [92] *Id.* at 395. [93] *Id.* at 389.

[94] Brief for Appellant, p. 54, 193 Md. 300, 67 A.2d 497 (1949).

[95] 381 U.S. at 540. [96] *Supra* note 15.

could control the release of prejudicial information to do so. He suggested the Court had power to prohibit participants in the trial from making extra-judicial statements that might be prejudicial. He also suggested the promulgation of regulations by government officials prohibiting release of information concerning the case by their employees as well as warnings to reporters writing material harmful to the defendant's case.[97] Impliedly, along with the warning to newsmen, some type of disciplinary action would be in order. When he said: "Collaboration between counsel and press . . . affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."[98] Did he mean the press could be disciplined? If so, the attitude of some members of the news media, i.e., "We may or may not believe what we say, but we'll defend to your death our right to say it," may be on the way out.

### REMEDIES SUGGESTED

Remedies suggested to secure a fair trial in the face of adverse comment and publicity have been legion. Among solutions that might furnish partial answers to the problem we find the following: the blue ribbon jury permitted under *Fay v. New York*,[99] giving to the defendant the sole discretion to waive jury trial in criminal cases;[100] allowing the judge to take the case from the jury when the jury can no longer be impartial due to outside influences (revisions in most constitutions would be required here); keeping the records of a criminal case secret, and allowing the defendant to have a secret trial.[101] Denying admission to the trial to the public generally, including the news media, has been held not to violate press freedom.[102] Exclusion is thus able to minimize adverse comment during trial. A statute authorizes a damage suit against the author, printer, or publisher of any publication that improperly tends to bias the minds of the public, court, officers, witnesses, or jurors on any question pending before the court.[103]

The main thrust, however, of the proposals has been directed toward controlling and disciplining participants in the trial and government employees. The Department of Justice has established guidelines for the release of information to the news media that govern

[97] *Id.* at 1521–22. [98] *Id.* at 1522. [99] 332 U.S. 261 (1947).

[100] Patton v. United States, 281 U.S. 276 (1930). [101] *Supra* note 8, at 822–834.

[102] United Press Ass'n v. Valente, *supra* note 58, at 77, 123 N.E.2d at 778.

[103] Act of June 16, 1836, P.L. 784, § 27, Pa. Stat. Ann. tit. 17, § 2045 (Purdon, 1962).

from the time of arrest until termination of the proceeding. Observations about a defendant's character, admissions made by him, reference to investigative procedures, information regarding witnesses, and statements concerning evidence or arguments cannot be released.[104] Presumably reprimand or dismissal of the employee would be the means of enforcement.

A bill introduced as a proposed new section to the Federal Criminal Code makes it a contempt of court punishable by fine for any federal employee, a defendant or his attorney to "promise or make available for publication information not already properly filed with the court which might affect the outcome of any pending criminal litigation, except evidence that has already been admitted at the trial."[105]

The New Jersey Court has interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to ban public statements by the prosecution's staff as to admissions, or such remarks as the case is "open and shut," or setting forth the accused's criminal record.[106] Lethargy in giving force and effect to the canon has robbed it of much of its potential efficacy.

Mr. Justice Clark said: "The courts must take such steps by rule or regulation that will protect their processes from prejudicial outside influences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its functions."[107] The government and the courts would seem to have ample authority to prevent employees and those who are part of the proceedings from revealing prejudicial information. The more difficult problem is control of the news media.

The federal courts are on record against photographing, televising, and broadcasting while judicial proceedings are in progress.[108]

Voluntary cooperation on the part of the news media in withhold-

[104] 28 O.F.R. § 50.2 (1966). [105] S.2290, 89th Cong., 1st Sess. (1965).

[106] State v. Van Duyne, 43 N.J. 369, 204 A.2d 841 (1964): Canon 20 states: Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally, they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file with the Court; but even in extreme cases it is better to avoid any ex parte statement. [Italics omitted.]

[107] Sheppard v. Maxwell, *supra* note 15, at 1522.

[108] Rule 53, Federal Rules of Criminal Procedure; Annual Report The Judicial Conference of the United States, (March 8–9, 1962) 10.

ing prejudicial information and criticism has not been the answer. The news gathering agencies have indicated an unwillingness to submit to a code which will furnish operating standards.[109] The press is not an organized profession capable of applying sanctions or expulsion of offending members. The news media cater to a large variety of reading, viewing, and listening audiences. Competition is ever present with the competitor exercising the least restraint too often getting the greater circulation.[110]

It is submitted that the time is ripe for a narrowly drawn contempt statute that would apply to employees of news media as well as prosecutors and defense counsel and their staffs, the accused, subpoenaed witnesses, enforcement officers, and government officers and employees. The Attorney General's Statement of Policy[111] could furnish the direction for such a criminal contempt statute which would delineate specific types of punishable publication. Any person in the above categories responsible for the publication would be subject to criminal contempt proceedings with the punishment including at least a fine.

The following would be prohibited: (1) Observations about the accused's character and derogatory descriptions of him, such as "mad dog killer"; (2) The existence of statements and confessions attributable to the defendant as well as the statement and confession; (3) Reference to investigative procedures such as ballistics tests; (4) Statements regarding the identity, testimony or credibility of prospective witnesses (5) Statements concerning evidence or arguments in the case; (6) Comment intended to influence judge or jury or criticism of judge or jury; (7) Expressions of opinion regarding guilt or innocence; (8) The prior criminal record of the accused; (9) Reference to tangible evidence seized from the accused during a search or arrest; (10) Revealing the names and addresses of jurors if the jury has not been sequestered.[112]

The above publications would fall within the penalized class in a

109 THE PRESS-BAR COMMITTEE OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS REPORT OF 9 (April 14, 1965) said in part: "We are persuaded that no set of specific rules can be written into a code of press conduct that will not do more harm than good. . . ." See also FELSHER & ROSEN, THE PRESS IN THE JURY BOX (1966).

110 Taylor, *The Ditchley Papers, Crime Reporting and Publicity of Criminal Proceedings*, 66 COLUM.L. REV. 34, 54 (1966).

111 *Supra* note 104.

112 See Will, *Free Press v. Fair Trial*, 12 DE PAUL L. REV. 197, 215 (1963): Judge Will would have two broad categories into which would fit various types of prejudicial matter, material which per se is a clear and present danger to the administration of

criminal case from the time of the arrest of the accused until the verdict of the jury, judgment of the court, or their admission into evidence. They would not encompass *Bridges* where criticism was made while motions for new trial and sentencing after verdict were pending. They would not encompass *Pennekamp* where indictments were dismissed and criticism was directed at the judge's dismissal. They would not encompass *Harney* where criticism took place in a civil suit at a time a motion for a new trial was pending. They would not encompass *Wood* where the judge's motives in charging a grand jury were questioned and the accusatory finger of the grand jury had not, as yet, pointed at anyone.

The contempt statute would apply in both bench trials and jury trials. While it is true that judges are better qualified to sift evidence, it is also true that judges have aspirations for re-election and for higher office. Judges are human and can be influenced by the concerted action of the powerful news media. If the statute covered only jury trials, there might be subtle influences brought to bear on the accused to waive his right to a jury trial. Those who desired to violate the statute might gamble on whether the accused would waive. The publication itself should call for a sanction and should not depend upon whether judge or jury heard the case.

The contempt should be heard by the judge who conducted the trial. He should initiate the proceedings since he would, in most instances, be at odds with the press for its having knowingly violated the statute. Thus, there is less chance of his decision being influenced by the concerted action of the news media. A statute calling for information or indictment with the Grand Jury and the District Attorney involved would, on the other hand, not be satisfactory. Members of the Grand Jury itself might have been influenced by the original prejudicial material. The District Attorney often exercises considerable influence over the Grand Jurors and the District Attorney, as an elected official, would not care to antagonize the news media. More importantly, it is not uncommon that the prejudicial material comes from the district attorney's office or from the law enforcement section with which he is closely allied. Of course, in the contempt proceedings a full hearing should be had on the record with right to counsel and right to appeal.

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criminal justice and material which a jury may find is a serious and imminent threat to the administration of criminal justice.

In December of 1966 the American Bar Association's Committee on Free Press and Fair Trial issued a tentative draft as part of a project relating to minimum standards for criminal justice.[113] No substantial quarrel can be had with the Committee's recommendations relating to the conduct of attorneys, law enforcement officers, judicial employees, and judicial proceedings in criminal cases in this area of "free press."[114] It is, however, questionable whether its recommendation restricting the contempt powers of judges goes far enough to insure a fair trial. Judges may cite the press for contempt only in criminal cases and then only where the press publishes material outside of the court's public record. It is further restricted to circumstances where "the statement is reasonably calculated to affect the outcome of the trial and seriously threatens to have such an effect."[115] In addition, it is necessary that the restricted material must be published during the period beginning with the selection of the jury and ending with a verdict of judgment. Thus, the report would give the news media a relatively free hand during pre-trial periods. Only if the publication violated a valid judicial order not to disseminate specified protected information could the press be held in contempt for what transpired prior to the trial. A judge sitting without a jury, specifically, could not punish those who "disseminate information by means of public communication" in a way prejudicial to the defendant. The statements published during a jury trial must be either actually intended to affect the outcome of the trial or it must appear that they were so likely to affect the outcome that the persons making them could have acted only with reckless disregard of the results. Under ABA proposed standards, it isn't sufficient that the statements would be reasonably calculated to have the effect. There must have been a clear and present danger that the evil sought to be prevented would occur.[116]

The real danger to a fair trial is in prejudicial publication. That which is reprehensible with regard to an attorney, a law enforcement officer, or a judicial employee making prejudicial information available from the time the defendant is arrested or indicted should be equally reprehensible when the same information is published, even if prior to the trial, even if there is no specific intent or reckless disregard, even if a "clear and present danger" is not present, and even if it is a trial without a jury.

[113] ABA, ABA STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Tent. Draft, 1966).

[114] *Id.* at 2–14. [115] *Id.* at 14–15. [116] *Id.* at 68–73 and 150–54.